IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 6TH SEPTEMBER 2007 / 15TH BHADRA 1929

RSA.No. 690 of 2007()

AS.122/2003 of DISTRICT COURT, KASARAGOD
OS.74/1999 of SUB COURT, KASARAGOD

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: APPELLANT/APPELLANT/DEFENDANT

K.DEVAPPA, AGED 49 YEARS, S/O.CHANIYA,
HINDU, LANDLORD, RESIDING AT SATHYA NILAYA,
SAMPATHILA NEKRAJE VILLAGE AND POST,
KASARAGOD TALUK AND DISTRICT.

BY ADV. SRI.K.SHRIHARI RAO

RESPONDENTS: RESPONDENT/PLAINTIFF

M/S.KASARAGOD SELF EMPLOYEES FINANCING
COMPANY, KASARAGOD REPRESENTED BY ITS MANAGING
PARTNER, M.JAYASHEELA, W/O.T.V.GANGADHARAN,
RESIDING AT 'JEEVAN JYOTHI', KADLU VILLAGE,
KASARAGOD TALUK AND DISTRICT.

BY

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 06/09/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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R.S.A. NO. 690 OF 2007

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Dated this the 6th day of September, 2007

JUDGMENT

Defendant in O.S.74/1999 on the file of Sub Court, Kasaragod is the appellant. Plaintiff is the respondent. Respondent instituted the suit seeking a decree for specific performance of Ext.A1 agreement for sale dated 16.8.1996. It was contended that as per Ext.A1 agreement, appellant agreed to sell the plaint schedule property for a total considertion of Rs.1,10,000/- and Rs.1,00,000/- was paid as advance and appellant has to execute the sale deed on or before 2.12.1996 and he handedover possession of the property also but did not execute the sale deed and respondent has always been ready and willing to perform his part of the contract and inspite of Ext.A2 notice demanding performance of the agreement, appellant did not do so and therefore respondent is entitled to a decree for specific performance. Appellant

filed a written statement contending that he has alredy sold the property to one Krishnan and appellant had borrowed Rs.1,50,000/- in four separate loans from the respondent and on repayment of three loans, he borrowed Rs.1,00,000/- and at that time respondent obtained several blank signed cheques and blank papers as security and out of Rs.1,00,000/- so borrowed appellant repaid Rs.7,000/- and making use of the signed blank paper Ext.A1 agreement was created and respondent is not entitled to the decree sought for.

2. Learned District Judge on the evidence of PW1, DW1 and Exts.A1 to A3 and Exts.B1 to B17 found that Ext.A1 agreement was executed by the appellant and he received Rs.1,00,000/- and only Rs.10,000/- is to be paid towards balance consideration and respondent has always been ready and willing to perform his part of the agreement and therefore respondent is entitled to the decree for specific performance. Suit was decreed directing appellant to execute the sale deed after

receiving the balance consideration. Appellant challenged the decree and judgment before District Court, Kasaragod in A.S.122/2003. Learned District Judge on reappreciation of evidence confirmed the findings of learned Sub Judge that Ext.A1 agreement for sale was executed by the appellant. But finding that relief for specific performance is a discretionary relief and on the facts respondent is not entitled to a decree for specific performance of the agreement, decree was modified directing appellant to repay the advance consideration of Rs.1,00,000/- received with 6% interest from the date of suit till realisation. It is challenged in the second appeal.

3. Learned counsel appearing for appellant was heard.

4. The argument of learned counsel appearing for appellant is that as per the plaint allegation respondent is a company registered under Indian Companies Act and if so, there cannot be a Managing Partner for the Company and as the suit is filed by

the Managing Partner representing the Company, the suit is not maintainable and this fact was omitted to be taken note of by the courts below and hence the decree granted by the first appellate court is unsustainable. The argument of learned counsel appearing for appellant is that question whether there is a Managing Partner for a Company, registered under the Indian Companies Act and whether that Managing Partner is competent to represent the Company are questions of law and even without any pleading or evidence, this aspect can be agitated in the second appeal and therefore appeal is to be admitted.

5. On hearing the learned counsel, on the facts and circumstances of the case, no substantial questions of law are involved in the appeal.

6. Though in the plaint it was stated that respondent Company was registered under the Indian Companies Act and Jayasheela, who signed plaint as representing the Company is the Managing Partner no

contention was raised in the written statement to the effect that there is no Managing Partner for that Company or Jayasheela is not authorised by the company to institute the suit. In the absence of such a plea either before the trial court or before first appellate court, appellant is not entitled to contend at the second appellate stage that Jayasheela who represented the company is not competent to institute suit and on that ground the decree and judgment cannot be set aside.

7. Even according to appellant, he had received Rs.1,00,000/- from respondent and had given signed blank papers and signed blank stamp papers and Ext.A1 agreement was fabricated by making use of one such signed blank paper. The trial court and first appellate court on appreciating the evidence found that said contention of appellant is not correct and Ext.A1 agreement for sale was executed by the appellant. That factual finding, which was entered into on the basis of evidence, cannot be interfered by reappreciation of evidence

as sought for by the learned counsel in exercise of the powers of this court under section 100 of C.P.C.

8.On the evidence courts below found that Ext.A1 agreement for sale was executed and out of sale consideration of Rs.1,10,000/-, Rs.1,00,000/- was received by the appellant on 16.8.1996. Though a decree for specific performance of the agreement was granted by the trial court, learned District Judge exercising the discretionary power modified the decree by directing appellant to pay only the advance consideration received by him with only 6% and that too from the date of the suit. In such circumstance, appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006